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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-906

CONSOLIDATION COAL COMPANY, a corporation,

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated,

Petitioners.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit appears at 467 F.2d 1124 (3rd cir., 1972). The opinion of the United States District Court for the Western District of Pennsylvania appears at 330 F. Supp. 474 (1971).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered September 27, 1972. The Petition for Writ of Certiorari was filed on December 20, 1972 and a copy thereof was received by Respondents' counsel on December 22, 1972.

The Petitioner is invoking the jurisdiction of this Court pursuant to 28 USC §1254(1).

QUESTIONS PRESENTED

1. Whether Perry Township, a political subdivision of the Commonwealth of Pennsylvania, has the power to tax non-resident miners who work in Perry Township.

2. Whether Pennsylvania's Local Tax Enabling Act requires non-residents to bear a greater portion of the tax burden than Pennsylvania residents.

STATEMENT OF THE CASE

The Parties

Consolidation Coal Company (hereinafter "Consol") is a Delaware corporation engaged in the mining of coal in the Humphrey Mine located beneath the surface of Perry Township, Greene County, Pennsylvania (Res. App. 8a).

Lawrence W. Bailey, a resident of West Virginia, is employed as a miner at the Humphrey Mine and is the representative of all West Virginia residents employed as miners at such mine (hereinafter collectively referred to as the "miners") (Res. App. 8a).

Perry Township is a political subdivision of the Commonwealth of Pennsylvania and all individuals, other than Bailey, are the supervisors or tax collectors of Perry Township (hereinafter collectively referred to as the "taxing authorities") (Res. App. 8a).

The Nature of the Action

Consol initiated this action in the United States District Court for the Western District of Pennsylvania by interpleading the miners and the taxing authorities as adverse claimants (Res. App. 9a). The jurisdictional fund consisted of the proceeds of Perry Township's 1% Earned Income Tax and its Occupational Privilege Tax which Consol withheld from the miners' wages (Res. App. 8a). The Earned Income Tax applies to the ". . . salaries, wages, commissions and other compensation earned by . . . [persons] within Perry Township. . . ." (Res. App. 8a). The Occupational Privilege Tax is predicated on ". . . the privilege of engaging in an occu-

pation within the Township of Perry. . . ." (Res. App. 8a).

The District Court, pursuant to a Memorandum Order of the United States Court of Appeals for the Third Circuit[1] accepted jurisdiction of the case, permitted the interpleader and on June 30, 1971, discharged Consol and awarded the fund to the taxing authorities[2] (Res. App. 31a, 32a).

Because of the Petitioners' failure to include citations to the record in the Petition and because of Petitioners' numerous misstatements of the facts as found by the District Court and adopted by the Court of Appeals, it is necessary to recite in this brief the factual basis on which the Court of Appeals affirmed the decision of the District Court.

Contrary to the assertions contained in the Petition for Writ of Certiorari, the District Court did not find that the miners paid an income tax to the State of West Virginia, did not find that they worked in a West Virginia mine and did not find that the employment contracts are made and enforced under the laws of West Virginia. Furthermore, the case does not involve taxation by school districts as asserted on Page 29 of the Petition. The District Court found, and the Court of Appeals adopted the findings of the District Court, that; the miners work extracting Pennsylvania coal entirely within

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1. A copy of The United States Court of Appeals' Memorandum Order at Nos. 71-1193 and 71-1304 is reprinted in the Appendix starting at Pg. 1a.

2. A copy of the United States District Court's opinion, conclusions of law, and findings of fact is reprinted as Appendix B starting at Pg. 7a.

the boundaries of Perry Township (Pet. App. 3a), the miners enter the mine in Perry Township, use a Perry Township bathhouse, a Perry Township parking lot and Perry Township roads (Res. App. 9a). The Court also found that Perry Township provides police and fire protection to the miners and provides them all other services generally provided to persons who reside in, own property in or work in Perry Township (Res. App. 10a). Consol pays taxes to Perry Township on the coal which is located in Perry Township (Res. App. 10a). There is an informal understanding between Pennsylvania and West Virginia by which the latter has mine-safety enforcement responsibilities (Res. App. 14a). The Court of Appeals determined that this informal agreement is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax (Pet. App. 3a, 4a).

ARGUMENT

The Petition for Writ of Certiorari Should Be Denied Because (a) Perry Township Has a Valid Constitutional Basis for Taxing the Miners; (b) The Decision of the Court of Appeals Does Not Conflict With Any Decisions of This Court; and (c) The Decision of the Court of Appeals Will Not Have a Deleterious Effect on the Constitutional Rights of the Miners.

Simply stated, the Petition raises two questions, both of which were correctly answered by the Court of Appeals; namely, whether Perry Township, a political subdivision of the Commonwealth of Pennsylvania, has the power to tax non-resident miners who work in Perry Township and whether Pennsylvania's Local Tax Enabling Act requires non-residents to bear a greater portion of the tax burden than Pennsylvania residents.

I.

PERRY TOWNSHIP HAS THE POWER TO TAX THE MINERS IN THE CASE AT BAR.

The Court of Appeals held that "A state can tax income produced within its borders, and can tax the income of non-residents from occupations carried on within its borders." (Pet. App. 3a). This Court, in *Shaffer v. Carter*, 252 U.S. 37, 52; 40 S.Ct. 221 (1920) held:

> And we deem it clear, upon principle as well as authority, that just as a State may impose general income taxes upon its own citizens and residents whose persons are subject to its control, it may, as a necessary consequence, levy a duty of like character, and not more onerous in its effect, upon in-

comes accruing to non-residents from their property or business within the State, or their occupations carried on therein; enforcing payment, so far as it can, by the exercise of a just control over persons and property within its borders. This is consonant with numerous decisions of this court sustaining state taxation of credits due to non-residents, *New Orleans v. Stempel,* 175 U.S. 309, 320, *et seq.; Bristol v. Washington County,* 177 U.S. 133, 145; *Liverpool &c. Ins. Co. v. Orleans Assessors,* 221 U.S. 346, 354 . . .

There is no question that the Perry Township has the constitutional power to assess the taxes in question. The miners enjoy substantial benefits provided by Perry Township. The District Court found that Perry Township provides the miners with fire and police protection, road maintenance and all other services generally provided to persons residing in Perry Township (Res. App. 10a). The attempt of the Petitioners to obfuscate the issue by failing to accurately state the facts, as found by the District Court, and by failing to include appropriate record citations can not withstand scrutiny once the findings of fact are reviewed. The miners attempt to avoid the consequences of the findings of the District Court by relying principally upon the informal understanding between Pennsylvania and West Virginia by which the latter has mine-safety enforcement responsibility. However, as the Court of Appeals found, that agreement is an administrative convenience irrelevant to the issue of Pennsylvania's power to tax (Pet. App. 4a).

The fact that West Virginia provides workman's compensation benefits, unemployment compensation

benefits and black lung compensation benefits to the miners is not relevant for the reason that the miners or their employer pay to the State of West Virginia appropriate taxes to cover such benefits and the State of Pennsylvania makes no attempt to tax either the miners or their employer for such benefits (Res. App. 16a). In truth, the fact that the miners do not receive such benefits from the Commonwealth of Pennsylvania has nothing whatsoever to do with the right of Perry Township to assess and collect the taxes in question.

II.

Pennsylvania's Local Tax Enabling Act Does Not Provide for Disparate Treatment Between Residents and Non-Residents.

The Court of Appeals held that the possibility that the Pennsylvania Act subjects non-residents to the risk of multiple taxation as urged by the miners is entirely hypothetical since the miners have not been subjected to any alleged discrimination (Pet. App. 4a). Consequently, the Court concluded that there was no justifiable issue concerning the effect of the Pennsylvania reciprocity provision (Pet. App. 4a). In fact, the complicated provisions of Pennsylvania's Local Tax Enabling Act, 53 P.S. §6914, merely protect Pennsylvania citizens from multiple wage or income taxation. They provide:

1. That Pennsylvania citizens who live in one local taxing authority shall pay local wage or income taxes in their place of residence rather than their place of work. Paragraphs 2 and 3 of §6914 provide that the place of work must grant a tax credit in the amount of

the local wage or income tax paid at the place of residence.

2. That Pennsylvania citizens who live in a local taxing authority, but who work out of state, shall pay wage or income taxes to the other state rather than to Pennsylvania. Thus, paragraph 5 of §6914 provides that residents of local taxing authorities receive credit for wage or income taxes paid to local taxing authorities outside Pennsylvania. Similarly, Pennsylvania residents receive credit for wage or income taxes paid to other states. (The latter provision now seems unnecessary, in light of the identical credit provided in the new Pennsylvania state income tax, 53 P.S. §7308).

Nothing in the Pennsylvania statute precludes West Virginia from using similar credit provisions to protect its citizens. It is up to West Virginia to protect its citizens from multiple taxation.

3. That nonresidents of Pennsylvania may be credited in the amount of taxes paid to their states, if their states provide similar credit to Pennsylvania citizens. This is the provision which the miners attack as one which imposes greater burdens upon nonresidents than upon residents. It does not do so. In effect, it permits nonresidents to pay taxes at their place of residence rather than their place of work—if their place of residence permits Pennsylvania residents to do the same, and if the local Pennsylvania authority so desires. If the Pennsylvania authority refuses to enact such a provision, the basic rule applies: both residents and nonresidents will pay taxes at the place of work rather than the place of residence. Nonresidents will not make

multiple payments, unless their own state laws are inadequate to protect them.[3]

The miners complain that the reciprocity provision benefits Pennsylvania at the expense of West Virginia. To the contrary, it merely protects Pennsylvania from being exploited by West Virginia. If Pennsylvania localities were required to give West Virginia residents a credit for taxes paid in West Virginia—as the miners contend—the result would be that Pennsylvania residents working in West Virginia would pay wage and income taxes to West Virginia, while West Virginia residents working in Pennsylvania would also pay wage and income taxes to West Virginia. In short, West Virginia would always be favored over Pennsylvania where the residents of one state worked in the other. Pennsylvania's reciprocity provision properly avoids this result.

It is thus incorrect to say, as the miners do, that nonresidents are being asked to bear a greater portion of the tax burden than residents of the Commonwealth of Pennsylvania. The miners' equal protection argument fails because it is based on an incorrect factual premise.

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3. West Virginia does in fact protect its citizens by providing a credit for state income taxes paid to other states: West Va. Code, §11-21-20. Furthermore, the record does not reflect, and the miners do not contend, that the miners pay local wage or income taxes in West Virginia. Thus, on the facts of this case, the miners are not subject to multiple taxation. Political subdivisions of the State of West Virginia do not have the power to enact either a personal income tax or an earned income tax: West Va. Const. Article X, Section 9; West Va. Code, §§ 11-8-1 to 11-8-33.

CONCLUSION

The Petitioners' arguments are completely without substance. The appeal to the Court of Appeals was frivolous. The Petition for a Writ of Certiorari is equally without merit. It is respectively submitted that the Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD DISTRICT

Nos. 71-1193 and 71-1304

CONSOLIDATION COAL COMPANY, a corporation

v.

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township; ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township.

CONSOLIDATION COAL COMPANY, a corporation, *Appellant* in No. 71-1193

LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated, *Appellant* in No. 71-1304.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 21, 1971

Before HASTIE, VAN DUSEN and ADAMS, *Circuit Judges*

Memorandum Order

The February 1, 1971, district court order from which this appeal is taken grants the motion of Perry Township (Greene County, Pennsylvania), its supervisors and tax collectors, to dismiss this interpleader action and directs the plaintiff to pay to such Township over $6,090. withheld, on account of taxes upon the privilege of engaging in an occupation within the Township, from the wages of its West Virginia resident employees working in Perry Township and approximately $49,500. on account of a 1% income tax of such Township upon wages earned in the Township by such nonresidents. The interpleader action, filed under 28 U. S. C. § 1335, joined the above-mentioned defendants who filed the above-described motion and the employee-residents of West Virginia as adverse claimants, since each of these claimants contends that they are entitled to the above-described wages withheld by the plaintiff-employer, which alleges that it has no interest in the fund and seeks a judicial determination as to which of the claimants is entitled to receive the fund. The district court acted in reliance upon *Consolidation Coal Co. v. Bailey,* 308 F. Supp. 1251, 1252-53 (N. D. W. Va., N. D., 1970),[1] and upon a decision of the Green County, Penn-

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1. The background facts are stated in this opinion. Since the West Virginia federal court decided it "should refrain from accepting jurisdiction," dismissal of that action for lack of jurisdiction precludes application of principles of res judicata to such decision. See *Wade v. Rogala,* 270 F. 2d 280, 282 (3d Cir. 1959). Also, the court noted that the action in the Pennsylvania state court was pending but had not been decided at the time of its decision, so that the record in this Western Dis-

sylvania, trial court for the Township in an action brought by it against plaintiff and the employees.[2]

The record makes clear that the district court had jurisdiction of the action under 28 U. S. C. § 1335 (cf. F. R. Civ. P. 22) in view of the diversity of citizenship of the claimants, who allege that they are entitled to the above-described withheld wages, and the filing by plaintiff of a bond in the amount of $55,584.93. See *State Farm Fire & Cas. Co. v. Tashire,* 386 U. S. 523, 530-34 (1967). Also, on this record plaintiff is entitled to a judgment discharging it from all further liability as to the wages withheld in the amount of such bond. See 28 U. S. C. § 2361; *Bank of China v. Wells Fargo Bank & Union Trust Co.,* 209 F. 2d 467, 473 (9th Cir. 1953); *Equitable Life Assurance Soc. of U. S. v. Miller,* 229 F. Supp. 1018 (D. Minn. 1964); *Rosenberger v. Northwestern Mutual Life Ins. Co.,* 176 F. Supp. 379 (D. Kan. 1959); *Savannah Bank & Trust Co. v. Block,* 175 F. Supp. 798 (D. Ga. 1959); *cf. Griffin v. McCoach,* 313 U. S. 498, 499 (1941). In *E. J. Van Ingen & Co. v. Connolly,* 225 F. 2d 740, 744-45 (3d Cir. 1955), this court stated:

". . . [T]he normal duty of a district court [is] to permit interpleader liberally to relieve parties of the hazards and vexations of conflicting claims

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trict of Pennsylvania action is quite different from that on which the above cited February 5, 1970, decision was based.

2. In this action, only Mr. Bailey had been served personally and the employees had failed to appear, after receiving notice by publication in a newspaper in Perry Township (as opposed to a newspaper published in their West Virginia county of residence). The plaintiff Coal Company took no appeal in that action, having adopted the position that it was a stakeholder.

> against them. . . . [T]he Federal Interpleader Act should be construed and applied liberally 'first, to relieve a stakeholder without interest from present litigation, and secondly, to relieve such a one from future litigation by adjudicating the claims of all parties in one suit.' "

In the *Tashire* case, *supra*, the court said at page 533:

> "[T]he language of the present statute . . . is remedial and to be liberally construed."

On the facts of this record,[3] where any injunction would only protect plaintiff (a withholding employer, as opposed to the basic taxpayers) against a multiplicity of suits with reference to moneys withheld in the past on demand of a taxing authority, the terms of 28 U. S. C. § 1341 do not preclude the jurisdiction of the district court to determine this controversy over this fund of withheld wages in accordance with 28 U. S. C. §§ 1335 and 2361. See *Builders and Developers Corp. v. Manassas Iron & Steel Co.*, 208 F. Supp. 485, 491-92 (D. Md. 1962); *cf. Miller v. Nut Margarine Co.*, 284 U. S. 498 (1932); *Shelton v. Gill*, 202 F. 2d 503 (4th Cir. 1953); *Adler v. Nicholas*, 166 F. 2d 674 (10th Cir. 1948); *Glenn v. American Surety Co.*, 160 F. 2d 977 (6th Cir. 1947).

We cannot overlook the fact that this matter has been in litigation in five previous suits since March 1969 and the taxing authority, in vital need of the withheld

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3. It is noted that the taxpayer employees only claim the refund of the portion of wages withheld in the past on acount of taxes, as opposed to an injunction against the future enforcement of the tax, and it seems clear that they are limited to such claim in this interpleader action.

fund (which is a substantial part of its budget) still has not received a determination of its claim. Also, we cannot say on this record that the claims raised by the taxpayer-employees, particularly the claims that they were denied adequate notice required by the due process clause in the Pennsylvania state court actions (see footnote 2 above), are frivolous.[4]

The district court order of February 1, 1971, is vacated and the case remanded for proceedings, including a prompt trial and opportunity for argument, consistent with this Memorandum Order. The certified judgment in lieu of a formal mandate will issue forthwith.

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4. The following terms of Rule 2230(a) of the Pennsylvania Rules of Civil Procedure raise some doubt on the ability of the Pennsylvania state courts to render a class action decision in this controversy with binding in personam effect on a class of non-residents such as these West Virginia taxpayers:

> "(a) If persons constituting a class are so numerous as to make it impracticable to join all as parties, any one or more of them who will adequately represent the interest of all may sue or be sued on behalf of all, but the judgment entered in such action shall not impose personal liability upon anyone not a party thereto."

See *Spector Motor Service v. O'Connor,* 340 U. S. 602, 605 (1951), where the court said: "The United States District Court had jurisdiction over this case in the first instance because of the uncertainty of the adequacy of a remedy in the state courts, and it did not lose that jurisdiction by virtue of the later clarification of the procedure in the courts of Connecticut"; *see also Georgia R. Co. v. Redwine,* 342 U. S. 299, 303 (1952); *cf. Denton v. City of Carrollton, Georgia,* 235 F. 2d 481, 486-87 (5th Cir. 1956).

Memorandum Order.

Judge Hastie dissents because he believes the granting of relief in this case would be contrary to the intendment of Section 1341 of Title 28 U. S. C.

BY THE COURT,

FRANCIS L. VAN DUSEN
Circuit Judge

Dated: June 7, 1971

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CONSOLIDATION COAL COMPANY, a corporation, Plaintiff, v. LAWRENCE W. BAILEY, individually and as the representative party of all other persons in the class similarly situated; THE TOWNSHIP OF PERRY, Greene County, Pennsylvania; FLOYD BIRCH, E. D. LEMLEY and L. CARL PHILLIPS, as Supervisors, constituting the Board of Supervisors of said Perry Township, ESTELLA JOHN as Occupational Privilege Tax Collector of said Perry Township; and DON WILKINSON as Earned Income Tax Collector for said Perry Township, Defendants	Civil Action No. 70-1144

Findings of Fact and Conclusions of Law

*Findings of Fact**

1. The plaintiff in this interpleader action is Consolidation Coal Company ("Consol"), a Delaware corporation engaged in the mining of coal at the Humphrey

* The 14 Findings of Fact, marked with an asterisk are agreed to by all parties. Bailey agrees to 6 additional findings and Consol to 2 (see page 5).

Mine located in Perry Township, Greene County, Pennsylvania (Jt. App. 75a, 77a, 79a, 187a).**

2. Lawrence W. Bailey ("Bailey") is a miner, and a representative of all miners who reside in West Virginia and work at the Humphrey Mine in Pennsylvania (Jt. App. 25a, 27a).

3. Bailey has adequately represented the class throughout this and prior proceedings.

*4. The Township of Perry is a political subdivision of the Commonwealth of Pennsylvania, and the individual defendants other than Bailey are the supervisors and tax collectors for the township (collectively referred to as the "taxing authorities") (Jt. App. 75a).

*5. In December of 1968, Perry Township enacted a 1% Earned Income Tax payable by non-residents for services rendered within the township (Jt. App. 76a-77a, 111a-134a) and an Occupational Privilege Tax (Jt. App. 76a, 103a-110a).

*6. The Earned Income Tax is levied upon "net profits earned after January 15, 1969, from businesses, professions, and other activities conducted by . . . non-residents within Perry Township, and on salaries, wages, commissions and other compensation earned by . . . non-residents within Perry Township" (Jt. App. 111a).

*7. The Occupational Privilege Tax is levied upon "the privilege of engaging in an occupation within the Township of Perry" (Jt. App. 103a).

** Such references are to the Joint Appendix used at the appeal of this Court's granting of the motion to dismiss herein.

8. Consol has, since March 17, 1969, withheld the taxes as required by the Earned Income Tax resolution and the Occupational Privilege Tax ordinance, but has refused to deliver the taxes collected to the taxing authorities (Jt. App. 76a).

9. In this action Consol seeks to interplead the taxing authorities and the miners as purportedly adverse claimants to the fund, which consists of Earned Income and Occupational Privilege Taxes withheld from the miners wages as of the date of the complaint, as well as "such additional amounts of taxes imposed by Perry Township as plaintiff shall in the future withhold from the wages of its employees who are members of the class" (Jt. App. 10a-12a).

*10. The fund which Consol attempts to interplead herein currently totals more than $60,000.00 in taxes withheld.

11. The Township's total operating governmental budget for the year 1970 was approximately $62,500.00 (Jt. App. 76a).

*12. The class members are residents of West Virginia who work as miners in the Humphrey Mine. They are required for employment purposes to travel to the mine's Mount Morris (Pennsylvania) portal to commence their work (Jt. App. 54a-55a).

*13. Annexed to said portal is a bath house which is used by the miners to change clothes before descending down the portal's elevator to the situs or work. (Jt. App. 55a).

*14. The coal presently being mined in the Humphrey Mine is geographically located under the surface of Perry Township (stipulation on appeal).

*15. At all times since March of 1969, the coal being mined in the Humphrey Mine has been geographically located under the surface of Perry Township.

*16. All of the coal which is being mined in the Humphrey Mine is transported via haulage ways under Perry Township, then under Dunkert Township, Greene County, Pennsylvania; and finally into Cass District, Monongalia County, West Virginia.

17. All of the coal being mined in the Humphrey Mine, and all surface installations in Perry Township are assessed in Perry Township, and Consol pays taxes to Perry Township, to the Central Greene School District and to Greene County on all such properties.

18. Consol's properties in Perry Township include the Mount Morris portal; a new portal northwest by west of the Mount Morris portal—i.e., further into Perry Township; substations known as bore holes which are used to conduct electricity to the mines and which are placed approximately every 3,000 feet along the haulage ways; and ventilation substations which include fans required by federal regulations to move at least 9,000 cubic feet of air per minute from the mines.

19. Perry Township maintains the roads to and from Consol's installations, provides police and fire protection to Consol and its employees, including the miners, and provides them with other services generally provided to persons who reside in, own property in or work in Perry Township.

20. The basic argument of the miners is that the taxes levied by Perry Township are unconstitutional in that the Township does not have a sufficient jurisdictional nexus with the miners.

21. It is the contention of the miners that portaling in Mount Morris is the only taxable event, that once the miners descend into the mine (which is under Perry Township) they are within the regulatory jurisdiction of West Virginia, and that entrance into the mine through a Pennsylvania portal does not give Pennsylvania jurisdiction to tax the miners.

22. The taxing authorities contend that the most important nexus or taxable event or incident is the miners' working in Perry Township.

23. All members of the class of miners work in Perry Township.

*24. Consol has agreed to pay into court all monies withheld up to the date of its discharge, if any, and to include in such payments the earnings which have accumulated upon such withheld funds.

*25. Consol agrees to waive any claim to counsel fees arising out of this litigation.

*26. Consol agrees that, if a final judgment on the merits is entered in this action in favor of the taxing authorities, it will continue to withhold the taxes and to pay them over as required by the ordinance and resolution of Perry Township.

*27. At the hearing held on June 21, 1971, certain stipulations were made and all parties agreed that they had not further evidence to adduce on the merits of this case; and all parties agreed that the record was sufficient for this Court to decide the case on its merits.

28. All miners currently working at the Humphrey Mine were mailed a notice inviting them to appear

at the June 21 hearing. Nobody other than Bailey and his counsel appeared in response to the invitation.

THE FOLLOWING FINDINGS OF FACT ARE STIPULATED TO BY COUNSEL FOR BAILEY: NUMBERS 1-16, 24-27.

THE FOLLOWING FINDINGS OF FACT ARE STIPULATED TO BY COUNSEL FOR CONSOL: NUMBERS 4, 5, 6, 7, 10, 12, 13, 14, 15, 16, 17, 18, 24, 25, 26, 27.

Conclusions of Law

1. The Memorandum Order of the Court of Appeals herein, dated June 7, 1971, precludes this Court from dismissing for want of jurisdiction under 28 U.S.C. Section 1341 and this Court therefore denies the taxing authorities' motion to dismiss on the basis of Section 1341.

2. In light of the opinion of the Court of Appeals, the asserted res judicata effect of the Greene County judgments (rendered in cognate cases) is irrelevant to the disposition of the case, and this Court therefore denies the taxing authorities' motion to dismiss on the basis of the prior adjudications.

3. The findings of fact demonstrate that there is sufficient "nexus" or "taxable event" or "incident" for the taxing authorities to impose taxes upon the miners who work in the Humphrey Mine in Pennsylvania.

4. The constitutional argument advanced by the miners is without merit. The taxes are valid and constitutional.

5. The miners are not meritorious claimants to the fund of withheld taxes herein.

Additional Findings of Fact.

6. The Court of Appeals has mandated that Consol is entitled to be discharged.

7. Consol's discharge is conditioned upon payment into Court of all taxes withheld plus the earnings accrued upon such funds prior to September 28, 1970, or the statutory interest of 6%, whichever is greater, plus the earnings accrued from September 28, 1970 to the date of payment into Court.

8. The taxing authorities are entitled to the fund interpleaded.

9. Nothing herein shall be deemed to preclude the taxing authorities from claiming additional interest under the provisions of the taxing ordinance and resolution at issue here or under the Local Tax Enabling Act of 1965.

DUMBAULD,
U.S.D.J.

Additional Findings of Fact

1. Consolidation Coal Company is a corporation doing business in West Virginia and conducting extensive mining operations in West Virginia under the laws of West Virginia.

2. The Consolidation Coal Company, through its operating division, Christoper Coal Company, is engaged in the mining of coal in Monongalia County, West Virginia at what is commonly known as the Humphrey Mine.

3. The Humphrey Mine was originally opened in West Virginia and presently all coal taken from the

mine is removed in West Virginia and processed and shipped from West Virginia.

4. The present shafts within Pennsylvania which penetrate the coal seam worked in the Humphrey Mine are used exclusively for ingress and egress of personnel and for ventilation but not for the removal of coal.

5. There is an informal agreement bearing upon jurisdiction of mines that cross state boundaries between the State of West Virginia and the Commonwealth of Pennsylvania. This agreement is recognized and acted upon by the authorities of these states who are charged with the enforcement of State mining laws. This agreement provides that the State where the original opening of a mine occurs asserts jurisdiction over the entire mine, even though mining operations may proceed under the other state so long as the company that is conducting such mining operations is present and doing business in the State of the original opening under this agreement and consequently the mine originally opened in West Virginia is under the jurisdiction of West Virginia mining laws, even though mining operations occur under the Commonwealth of Pennsylvania.

6. So far as state laws are concerned, the Humphrey Mine is operated exclusively under the laws of the State of West Virginia Department of Mines.

7. The miners are residents and taxpayers of the State of West Virginia.

8. The miners are and have been continuously employed by Consolidation Coal as miners in the Humphrey Mine and are required for employment purposes to travel to Mt. Morris, Pennsylvania to commence their work.

Additional Findings of Fact.

9. The travel time from the West Virginia border to the Mt. Morris portal is approximately three minutes.

10. Annexed to the Mt. Morris portal is a bathhouse that is used by the miners to change clothes before descending down the portal to the situs of work.

11. Pursuant to the National Bituminous Coal Wage Agreement of 1968, to which Consolidation and the miners are parties, the bathhouse is furnished to the miners by Consolidation Coal Company.

12. The said agreement provides:

> There shall be no charge by the operator (Consolidation Coal) for use of a bathhouse or washroom. The operator will furnish soap in the bathhouses or if washrooms are not furnished by the operator, other satisfactory arrangements will be made between the operator and the district (page 38)

13. The average time spent in the bathhouse is approximately five minutes. The miners then enter the mine by way of a portal elevator.

14. The pay period for the miners does not begin until there is an entrance on the portal elevator.

15. The said agreement between Consolidation Coal Company and the miners provide:

> Wages and Hours
>
> (a) For all inside employees a work day of eight hours from portal to portal which means collar to collar or bank to bank, is established including a staggered thirty minutes for lunch, and without any intermission or suspension of operation throughout the day. (page 18)

Additional Findings of Fact.

16. Originally, all portals of entry into the Humphrey Mine were located in West Virginia and the Mt. Morris portal was constructed to save Consolidation Coal Company wasted manpower hours in travel from the portal to the actual situs of work.

17. The miners are members of the United Mine Workers of America, Local District 31. This District is headquartered in Fairmont, West Virginia and the jurisdiction of this District extends only to West Virginia mines.

18. The miners receive no benefits from the Commonwealth of Pennsylvania or its political subdivision such as workmen compensation, unemployment, black lung compensation, and other benefits and privileges given to miners who work under the jurisdiction of the State of Pennsylvania Department of Mines and Mineral Industries.

19. 335 miners all employed by Consolidation Coal Company and all using the Mt. Morris portal are residents of West Virginia including their representative, Lawrence W. Bailey.

20. Consolidation Coal Company is withholding and accumulating from the miners' wages an amount totaling over $60,000 pursuant to an occupational and non-resident income taxes imposed by Perry Township, Greene County, Pennsylvania.

22. The Perry Township income tax upon wages earned by nonresidents is levied against all income of the miners during the year. As such, the vacation pay of the miners is included.

23. The miners are entitled to an annual vacation of fourteen days. In addition to the fourteen days, the

miners are entitled to an additional day of vacation for each year over ten (10) that he has worked continuously. The maximum additional days for vacational purposes per year are ten (10).

24. The State of West Virginia levies a personal property tax on all personal property used in the Humphrey Mine.

25. The State of West Virginia levies a business and occupational tax against Consolidation Coal based on the amount of coal produced from the Humphrey Mine.

DUMBAULD, USDJ

June 30, 1971

Opinion

DUMBAULD, J.

This judicial odyssey had its genesis in the attempt of the township of Perry, in Greene County, Pennsylvania, to extract an earned income and occupational privilege tax (collectible through withholding by their employer) from the miners (residents of West Virginia) who extract coal from the bituminous deposits underlying said township.

On January 27, 1968, Perry Township levied a $5 tax "upon the privilege of engaging in an occupation within Township of Perry in the fiscal year 1968, from the effective date of this ordinance, February 1, 1968."[1] On December 20, 1968, a tax of one percent was imposed, for each calendar year beginning with 1969 "upon the . . . compensation earned for activities or services performed or rendered within the Township by individual non-residents of the Township."[2]

It is thus clear that which is taxed by these ordinances is the performance of activities or services, for pay, within the township, that is to say, engaging in a gainful occupation within the township.

It is plain (to this Court at least) that such a tax is constitutionally valid, and supported by an adequate

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1. R. 104a-105a. For convenience, citations will be to the printed Joint Appendix in C.A. 3, No. 71-1193, cited as "R".

2. R. 115a-116a.

"nexus."[3] It is settled that non-resident federal employees may be taxed by a municipality where they work;[4] *a fortiori* employees of a private corporation are liable to such a tax.

It was stipulated on appeal in No. 71-1193 that the miners involved in this case are engaged in extracting coal within the bowels of Perry Township. The same stipulation was made at the hearing before this Court on June 21, 1971, after remand.[5]

Thus it is plain that on the merits of the case the tax is constitutional, and that the money withheld by the employer, Consolidation Coal Company, should be paid without delay to Perry Township.

How may this be done? How may this Court's conclusion be affectuated or "implemented," to use the current bureaucratic jargon?

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3. The useful term "nexus" was employed by Mr. Justice Tom C. Clark in *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450, 452 (1959), upholding a levy upon "local activities within the taxing State forming sufficient nexus to support the same." See Dumbauld, *The Constitution of the United States* 121-25 (1964).

4. *Application of Thompson*, 157 F. Supp. 93, 98 (E.D. Pa. 1957) aff'd 258 F. 2d 320 (C.A. 3, 1958), c.d. 358 U.S. 931 (1959).

5. It is therefore unnecessary to speculate whether merely entering the mine at a portal in Perry Township (to extract coal located in West Virginia) would itself be a sufficient "nexus." Perhaps misled by a notice from the "publican" employed to collect the tax that it applied to all persons "who work or portal at the Mt. Morris portal in Perry Township" (R. 136a), the litigation in the Monongalia County, West Virginia, court, hereinafter described, spoke of miners who "portal" at Mt. Morris. R. 139a, 141a, 142a.

Although it is against public policy for courts to interfere with the collection of taxes,[6] a process which though painful to those who pay is indispensable to the maintenance of government, several years of multifarious litigation have now elapsed without Perry Township being able to get its sticky fingers on the money reposing in the adhesive coffers of the coal company.[7]

With the goal thus in sight,[8] let us examine the tortuous maze of complicating factors thrown up by the respective parties to the case.

The first temple of justice where the peregrinating proceduralists made obeisance and hung their dank

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6. *E.g.*, 26 U.S.C. 7421(a); 28 U.S.C. 1341.

7. Philosophically, it seems unconscionable for the coal company to treat the tax as valid for the purpose of withholding wages earned by its employees, but as being of questionable validity insofar as paying over the withheld fund to the taxing township is concerned. This conduct brings to mind the feat of the Reconstruction Congress which recognized the defeated Confederate States as States within the Union for the purpose of having them exercise the supreme legislative function of ratifying the Fourteenth Amendment, but denied them representation in the enactment of ordinary legislation. *Negrich v. Hohn*, 246 F. Supp. 173, 180-81 (W.D. Pa. 1965). As Plautus said, to blow and to swallow at the same time is not easy. Dean Acheson, *Power and Diplomacy*, 105 (1958); "Simul flare sorbereque haud facile est." Mostellaria, Act III, 2.105. *U.S. v. Noonan* (C.A. 3, No. 18031, April 6, 1970) [Aldisert, J.].

8. Italiam sequimur fugientem Vergil, Aeneid, V, 629.

weeds as a trophy[9] was the Circuit Court of Monongalia County, West Virginia. In that tribunal on April 30, 1969, one Lawrence W. Bailey, a foreman employed by plaintiff Consolidated Coal Company, (contending that the tax was unconstitutional and void), obtained an injunction restraining the company from paying over any part of the withheld wages to the Pennsylvania taxing bodies or collector. (R. 141a- 142a). A similar injunction was entered on May 15, 1969. (R. 142a-143a).

The next tribunal honored by the peregrinating parties was the United States District Court for the Northern District of West Virginia. In that court (perhaps because the Monongalia County court could not obtain jurisdiction over the Pennsylvania taxing authorities), the coal company on August 29, 1969, brought an action of Interpleader under 28 U.S.C. 1335. (R. 146a-151a). The Pennsylvania tax authorities as well as Bailey (as representing the class of 312 miners residing in West Virginia from whom the company had withheld wages) were made parties. *Consolidation Coal Co. v. Bailey*. 308 F. Supp. 1251, 1252-53 (N.D. W. Va. N.D. 1970). Judge Sidney L. Christie, on February 5, 1970, held (very sensibly, in our judgment) that the controversy involved Pennsylvania tax law and might more appropriately be determined by the judiciary of that Commonwealth, wherein there was in fact a pending proceeding in which all parties could participate. He therefore dismissed the interpleader action.

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9. Me tabula sacer
Votiva paries indicat uvida
Suspendisse potenti
Vestimenta maris deo.

Horace, Odes, I; v, 11. 13-16.

It is not clear what happened to the proceeding, referred to by Judge Christie, but on March 12, 1970, the Perry Township Supervisors sued Consolidated and Bailey (as representing all employees of Consolidated residing in West Virginia and employed at the mine in Perry Township) at No. 542 in Equity in the Court of Common Pleas of Greene County for an accounting. (R. 159a-168a).[10] *Eodem die* the court ordered notice by publication for three successive weeks in the Democrat Messenger, a newspaper published in Waynesburg and established in 1813. (R. 169a-172a).

The miners contend that the court should have required that the persons whose wages were withheld should be notified individually (as was done in the case at bar),[11] but it seems that the litigation was one of considerable notoriety, and that it was probably for tactical reasons[12] that no appearance was made on behalf

10. An action of assumpsit was also filed on the same date at No. 95 August Term. R. 193a.

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11. Plaintiff's counsel notified all West Virginia residents now on its payroll from whom tax has been withheld of the hearing on June 21, 1971. He stated, however, that some of the fund may be composed of wages withheld from West Virginia residents now deceased, or moved away, or no longer working for plaintiff. We think the rule *de minimis* would apply to such portions of the fund, and that the questions of law would be identical with respect to such persons and the ones who received notice, so that the interests of all members of the class are adequately represented.

12. This stratagem is akin to lack of quorum in a legislative body resulting from intentional absence of members otherwise too few to defeat a pending measure.

A noteworthy example occurred in 1787 when opponents of ratification of the federal Constitution left

of Bailey or his group, and that judgment was taken by default, insofar as they were concerned, on July 6, 1970. (R. 186a-192a). We adhere to the view previously expressed that Judge Glenn Toothman's opinion (in which he quoted from an opinion of our learned colleague on this Court, Judge Louis Rosenberg) was entirely sound and correct and properly resolved the contentions as to constitutionality which are involved in the case.

Notwithstanding all that had gone before, the peregrinating parties then turned to the true shrine of juristic wisdom, the United States District Court for the Western District of Pennsylvania, where Consolidated on September 28, 1970, filed the instant action of interpleader against the same claimants (the amount now having grown to $55,584.93 from the $18,928.47 at stake in the West Virginia interpleader action). R. 5a-13a. Upon voluminous pleadings filed by all parties and a motion to dismiss supported by lengthy documentation, this Court on February 1, 1971, granted the motion to dismiss, adopting independently the reasoning of Judge Christie and Judge Toothman, as well as holding that the Greene County determination was *res judicata* and binding upon plaintiff. R. 83-85a.

The next mill to which the peregrinating parties brought their grist for fine grinding was the Court of Appeals for the Third Circuit, which on June 7, 1971,

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the Pennsylvania assembly without a quorum until a member was forcibly brought into the house and kept there (in spite of his wish to answer a call of nature) until provision for a ratifying convention could be enacted. McMaster and Stone, *Pennsylvania and the Federal Constitution* 1787-1788, 60-71 (1888).

vacated this Court's order of February 1, 1971, and remanded the case for further proceedings. Judge Hastie dissented on the ground that "the granting of relief in this case would be contrary to the intendment of Section 1341 of Title 28 U.S.C.."[13]

The opinion emphasizes that the miners claim in this action nothing but the fund in plaintiff's hands, as opposed to seeking an injunction against future enforcement of the tax; and that in an interpleader action they are inherently limited to such relief against the *res* in plaintiff's hands. Plaintiff, in other words, is merely a stakeholder of the fund and asserts no proprietary claim to the fund.

This does indeed seem to present the typical pattern of an interpleader action.

The Court does have jurisdiction of all parties, including the stakeholder and the two claimants.

A hearing was held on June 21, 1971, at which all three parties made stipulations regarding the matters put forth by each party and regarded by such party as significant. Such oral argument as the parties wished was also heard. In the light of these stipulations and the Court's rulings on certain points raised, we believe the path is now cleared for a disposition of the case on its merits. We shall make such a disposition, the parties having made clear and preserved for appellate review their contentions which have been ruled upon adversely by this Court.

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13. This section (referred to in footnote 6 *supra*) provides that "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

As would be expected, the brunt of the argument in developing intermediate issues was borne by the tax authorities and the miners. The company, as *tertius gaudens,* had little to say, except to request the discharge from further liability or litigation upon paying the fund into court. Counsel for Consolidation also generously waived a fee, in order that the fund might go undiminished by the usual counsel fees to its true owners. Bene meruit de republica. Let this deed be remembered gratefully by posterity as exemplifying the highest traditions of the legal profession.

To begin examination of Perry Township's contentions, it is to be noted that the argument is reasserted that the instant interpleader violates the policy of 28 U.S.C. 1341 against enjoining collection of taxes levied under State law. Whatever the merits of this position may be, it would be unseemly for this Court, as an inferior tribunal, to accept it, after the majority of the Court of Appeals has apparently considered but rejected it, as shown by Judge Hastie's dissent.

Moreover, on its merits, the majority is technically right as far as it goes. All that an interpleader action can deal with is the disposition of a particular fund. Any injunctions issued against suits with respect to the fund are simply ancillary or incidental to the disposition of the fund and merely have the purpose of enforcing the distribution made by the Court.

Counsel points to the language of the Complaint where relief is sought with respect to the fund "and any additions thereto." R. 12a-13a. Counsel for Consolidation acceptably explained these words as merely covering accretions to the fund pending determination by

the Court, not as applying to subsequent taxes. In other words, the size of the fund involved in the interpleader can not definitely be known until the Court orders its distribution to the proper parties. After the Court's determination nothing further would be affected by the judgment in this litigation.

From a practical standpoint, of course, Judge Hastie and the tax authorities are right in that the pendency of the interpleader action has prevented the Township from receiving the revenue involved. Likewise Consolidation might continue to impound in its coffers subsequent withholdings, after the current fund has been paid into court and distributed. But counsel for Consolidated has in open court stated that this course will not be followed. In any event, perhaps some weight as *stare decisis* might be attributed to this Court's determination of the controlling question, namely the constitutional validity of the tax.

Moreover, statutes prohibiting injunctions against collection of taxes are subject to judicial erosion. It is interesting to note the fate of the similar provision (now 26 U.S.C. 7421) prohibiting court restraints on the collection of federal tax.[14] Similar erosion has been experienced with respect to 28 U.S.C. 2283 forbidding injunctions to stay proceedings in State courts.[15] Per-

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14. See *Standard Nut Margarine Co. v. Miller*, 284 U.S. 498, 511 (1932), and the comments in Corwin, *The Twilight of the Supreme Court*, 94 (1934); and Corwin, *Court over Constitution*, 178-81 (1938). The *Nut* doctrine was reaffirmed in *Enochs v. Williams Packing Co.*, 370 U.S. 1, 7 (1962).

15. See Dumbauld, *Judicial Interference with Litigation in Other Courts*, 74 Dickinson L. Rev. 369, 385-87 (1970).

haps the elegantly bewiskered John Chipman Gray was right in thinking that statutes are only sources of law, that only what the courts say the statute means is really law.[16]

Moreover, if Perry Township's position were accepted it would mean that no interpleader action could ever be brought if one of the claimants was a tax collecting agency. Yet the Supreme Court, in the exercise of its original jurisdiction, has taken cognizance of the conflicting tax claims of different States in what is in substance an interpleader action. *Texas v. Florida,* 306 U.S. 398, 405-412 (1939).

At any rate, to distribute the fund now existing is not quite the same thing as to enjoin the collection of taxes *in future.*

Another contention of Perry Township which it would be unseemly for this Court to espouse is that plaintiff is not entitled to a discharge upon paying the fund into court, and that this Court, upon finding further facts, should again dismiss the interpleader action.

We are not convinced that the circumstances upon which the Township bases its contention are sufficient to undermine the plain holding by the majority of the Court of Appeals that interpleader is appropriate in the case at bar.

It is said that Consolidated is not a "disinterested" stakeholder, because it is seeking to curry favor with its employees by impeding the Township's efforts to collect the tax. Consolidated is clearly "disinterested" in

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16. Gray, *The Nature and Sources of the Law,* 125 (2nd ed. 1921).

the sense that it claims no proprietary interest in the money which it holds.[17] Nothing more is required of a stakeholder subject to conflicting claims in an interpleader proceeding. The psychological motives of the company are not of importance, so long as there is color of right in the conflicting claims asserted against it.

Turning now to the contentions of the miners, we note that they reaffirm the feudal principle that allegiance and protection are reciprocal, and allege that Pennsylvania and its subdivisions do not do enough for the miners to justify taxing them. No mine safety regulations, workman's compensation, "black lung" benefits, or other services are furnished by Pennsylvania. Apparently under an administrative arrangement between the two States, whenever a joint mine is opened the State first having occasion to exercise jurisdiction retains it. In substance, then, Pennsylvania does nothing for these miners "below ground." But above ground the municipal bodies exercise their normal activities of fire and police protection and the like. Perry Township particularly emphasizes that air shafts from the mine emerge above the soil in Perry Township and that protection of the source of air is of great importance to the welfare and safety of the miners at their work.

We conclude that Perry Township performs sufficient services to sustain its power to tax. Most taxpayers nowadays feel that they are not getting their money's worth. These miners are in no different posi-

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17. This is specifically stated in plaintiff's proposed Finding No. 10. No. 11 further states: "Consol has not and does not now seek any determination with respect to the validity of the Perry Township Tax Ordinances." See note 7 *supra*.

tion than taxpayers generally. It would be impractical to insist that each taxpayer must receive a specific benefit equal in value to the amount of his tax in order to constitute an adequate *quid pro quo.* The classical example is the bachelor with no children who must nevertheless pay school tax.

Another argument emphasized by counsel for the miners is the fact that certain individuals who do not "portal" in Perry Township, but enter the mine somewhere in West Virginia, have escaped taxation.

In view of the specific wording of the ordinances and the statements of counsel for Perry Township (the draftsman of the ordinances) we are satisfied that the individuals who have come in through the back door without being caught are simply sporadic instances of beneficiaries of ineffective enforcement, and do not represent a settled policy or practice on the part of the tax authorities of treating the place where the miner "portals" as the criterion of taxation *vel non.* See *Clark v. Ellenbogen,* 319 F. Supp. 623, 628 (W.D. Pa. 1970). It is clear that working in Perry Township soil is the true test of Taxability; and that all miners who do work in the Township will be taxed if the Township catches them.

The miners also emphasize that only extraction of the coal occurs in Perry Township; and that washing, processing, and preparation of the product is completed at facilities located in West Virginia. We do not think this circumstance detracts from Perry Township's power to tax, based upon the activities which *do* take place in the township.

In conclusion, we find and hold that plaintiff is entitled to discharge from liability (with ancillary and incidental injunctive relief against litigation with respect to such liability) upon paying into court the fund in its possession up to the date of entry of this opinion, together with such interest or other accumulation as may have resulted from prudent investment of such fund by plaintiff; and that as between the claimants to the fund Perry Township is entitled to receive the fund in its entirety.

This opinion shall be deemed to contain the finding of fact and conclusions of law which the Court deems necessary to the proper disposition of the case, and such other findings and conclusions which shall have been submitted by the parties in support of the issues which they consider necessary to sustain the points which they have preserved upon the record and which shall have been approved and signed by the Court, shall be deemed to have been incorporated herein by reference as fully as if they had been set forth herein *in haec verba*.

Order

AND NOW, this 30th day of June, 1971, IT IS HEREBY ORDERED:

(a) That plaintiff shall pay into Court, ten days from the date of this Order, all Perry Township Earned Income Taxes and Occupational Privilege Taxes withheld from the wages of the class herein represented by Lawrence W. Bailey, plus the earnings accrued upon such funds prior to September 28, 1970, or the statutory interest of 6%, whichever is greater, plus the earnings from September 28, 1970 to date of payment upon all taxes withheld;

(b) That plaintiff shall file with such payment, and shall serve upon all parties, an accounting which sets forth the method of calculation of the fund paid into Court, including the dates and amounts of taxes withheld and of earnings and interest accrued;

(c) That if no objection is made to such accounting within ten (10) days of its service upon all parties, plaintiff will on the eleventh day be relieved and discharged from further liability on any claim, now or hereafter made, based upon the fund paid into Court, with the exception noted in subparagraph (e) hereof;

(d) That this Court, having retained jurisdiction of this cause for the determination of the rights of the respective defendant-claimants in and to the fund paid into court, enters judgment, as of the date of discharge, in the entire amount paid into court, in favor of defendants the Township of Perry, its Supervisors and Tax Collectors;

(e) That this Order shall not preclude the Township of Perry, its Supervisors or Tax Collectors from claiming in the State courts additional interest upon the funds interpleaded under the provision of the Earned Income Tax resolution and the Occupational Privilege Tax ordinance of Perry Township or under the Local Tax Enabling Act of 1965;

(f) That defendant, Lawrence W. Bailey, and the other members of the class which he represents, are permanently enjoined as of the date of discharge from prosecuting the actions filed by him, individually and as a member of the class, against plaintiff, in the Circuit Court of Monongalia County, West Virginia, at Law Proceeding No. 10137 and Law Proceeding No. 10145; and/or from instituting or prosecuting any other action or proceeding against plaintiff or against the Township of Perry, its Supervisors or Tax Collectors, in any other Court based upon or affecting the fund paid into Court;

(g) That plaintiff and defendant Lawrence W. Bailey pay the costs of this action;

(h) That defendants, The Township of Perry, Greene County, E. D. Lemley, L. Carl Phillips, Floyd Birch, Estella John, and Don Wilkinson are permanently enjoined as of the date of discharge from further prosecuting the actions brought by them against plaintiff in the Court of Common Pleas of Greene County, Pennsylvania, at No. 542 in Equity and No. 95 August Term, 1969, in Assumpsit, specifically including but not limited to the filing of or further prosecution of any motions and/or rules to show cause filed or to be filed by said defendant or their counsel; and/or from insti-

tuting or prosecuting any other action or proceeding against this plaintiff in any other Court based upon or affecting the fund paid into Court by plaintiff.

DUMBAULD, U.S.D.J.

ORDERED TO BE FILED this 30th day of June, 1971.

EDWARD DUMBAULD
United States District Judge